Hastings Law Journal

Volume 18 | Issue 1 Article 4

1-1966

Wiretapping and Eavesdropping: A Review of the Current Law

Francis C. Sullivan

Wiretapping and Eavesdropping: A Review of the Current Law

By FRANCIS C. SULLIVAN*

OVER the years since its invention, the telephone has passed through the stages of being a luxury and convenience until today it is generally considered a necessity for both business and home. At the present time, there are more than eighty-eight million telephones in use in the United States.[1] Recent estimates place the number of telephone conversations in the United States at one-hundred fourteen billion per year[2] and the number per person at 591 per year.[3]

This wide usage of the telephone provides the background for the problem of wiretapping, which, as used here, refers to the surreptitious overhearing of telephone conversations by mechanical or electronic means.[4] The problem of the legality of eavesdropping and the use of evidence procured through wiretapping has been before the courts for almost forty years, and barring some dramatic change of circumstances seems certain to be a matter for judicial concern for at least the next forty years.

It is well to remember that we are dealing here with a basic tool of criminal investigation.[5] This simple fact is sometimes overlooked in the heat and passion surrounding partisan discussion of this subject,

* Professor of Law, Loyola University of Chicago; Visiting Professor of Law, Louisiana State University (1966-67).

[1] AMERICAN TELEPHONE & TELEGRAPH CO., THE WORLD'S TELEPHONES 2 (1966).

[2] *Id.* at 11.

[3] *Ibid.* For a discussion of the relation of these statistics to the problem of wiretapping and eavesdropping see *Hearing Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the United States Senate* Pursuant to S. Res. 234, 85th Cong., 2d Sess., on Wiretapping, Eavesdropping, and the Bill of Rights, Pt. 1 (1958).

[4] See generally DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS (1959); New York State Legislature, REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON PRIVACY OF COMMUNICATIONS AND LICENSUR OF PRIVATE INVESTIGATORS (1962); CAL. SENATE COMMITTEE ON JUDICIARY, REPORT ON THE INTERCEPTION OF MESSAGE BY THE USE OF ELECTRONIC AND OTHER DEVICES (1957).

[5] This article is limited to a consideration of wiretapping and eavesdropping by law enforcement officers. For one consideration of the use of wiretapping and eavesdropping by private investigators see Lipset, *The Wiretapping-Eavesdropping Problem: A Private Investigator's View*, 44 MINN. L. REV. 873 (1960). For examples of other uses of wiretapping and eavesdropping see Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1190-91 (1965).

resulting in strong preconceptions and even stronger blanket condemnations. Reduced to its most basic form, wiretapping is nothing more than a specialized type of surveillance, a method of investigation as old as the organized detection of crime.

Wiretapping came into widespread use as an investigative tool in order to combat the use of the telephone by the criminal element in society as an efficient scientific aid to the planning, preparation, and commission of crime. Since the telephone provides an immediate, direct, and private means of communication, freely available to criminals, some specialized method of surveillance was sought by law enforcement agencies to counteract the effects of the perversion of the telephone to criminal use.

It must be conceded by all that wiretapping is a most useful device for the detection of crime and the production of evidence of crime.[6] It has the great benefit of almost complete secrecy, while providing the ability to monitor and record verbatim telephone conversations at substantial distances. The cost of wiretapping operations is small in terms of both manpower and equipment, and, when compared to the information potentially obtainable, this cost becomes minute. It must likewise be conceded that wiretapping by its very nature constitutes an invasion of the privacy of telephonic communications, and provides a ready potential for abuse.[7] The basic difficulty with wiretapping is that it is indiscriminate—it subjects to official scrutiny all conversations, innocent as well as criminal, conducted by all persons using the tapped line. The balancing and weighing of these competing interests has proved to be a difficult task for the courts.

Background: Development of the Law

Wiretapping was first brought before the Supreme Court of the United States in 1928. The decision in *Olmstead v. United States*[8] has remained the basic law in this area for almost forty years, despite the vigorous and classic dissents by Justices Holmes,[9] Brandeis, Stone and

[6] See Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792 (1954); Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 MINN. L. REV. 835, 844 (1960).

[7] See AMERICAN CIVIL LIBERTIES UNION, THE WIRETAPPING PROBLEM TODAY (March 1962. Revised April 1965).

[8] 277 U.S. 438 (1928).

[9] Mr. Justice Holmes dissented on non-constitutional grounds, saying: "I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Id.* at 470. The much quoted phrase "dirty business" was used by Holmes to refer to wiretapping in violation of the Washington state statute, not to wiretapping in general. *Ibid.*

Butler.[10] The majority in this five to four decision laid down the rule that evidence obtained by federal officers through tapping telephone wires, even though in violation of a state statute, may be used in a criminal prosecution in the federal courts. Clearly the most significant holding by the Court was that wiretapping does not constitute an unreasonable search and seizure in violation of the fourth amendment, because it does not involve a "physical invasion of the premises."[11] Most of the law subsequently developed in this area is based upon this refusal to apply constitutional restrictions to the wiretapping method of producing evidence.

The Federal Communications Act: Section 605

In the course of the decision, the majority invited Congress to enact legislation to exclude wiretap evidence, a result which the Court thought could not be achieved merely by judicial interpretation of the

---

The late W. H. Parker, former Chief of Police in Los Angeles, in describing police work in general, observed: "It is often a dirty business—a very dirty business—because of the warped nature of the criminals with whom the police must often deal. But history has shown and is continuing to show that it is a necessary business, and that the responsibility must be placed on someone." Parker, *Surveillance by Wiretap or Dictograph: Threat or Protection?*, 42 CALIF. L. REV. 727, 728 (1954).

[10] Justices Brandeis, Stone and Butler dissented on constitutional grounds. Mr. Justice Brandeis introduced the concept of a right to privacy which should be protected not by the fourth amendment, but by the due process clause contained in the fifth and fourteenth amendments. He described the right to privacy as "the right to be let alone —the most comprehensive of rights and the right most valued by civilized men." 277 U.S. at 478. It is interesting to note that these dissents have been cited and quoted much more than the majority opinion, almost to the point of submerging the legal rationale of the decision in the sea of eloquence produced by the dissenters.

[11] The majority reasoned that the prohibition of the fourth amendment extends only to searches of a man's person, his house, his property and his effects, and that tapping a telephone wire does not involve any of these. The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

The Court also found no violation of the fifth amendment, there being "no evidence of compulsion to induce the defendants to talk over their many telephones," and since the defendants were "voluntarily transacting business without knowledge of the interception." 277 U.S. at 462. One is led to wonder whether this interpretation of the fifth amendment retains any validity in the light of recent decisions of the Supreme Court. In this connection, consider the following statement of the Court in Miranda v. Arizona, 384 U.S. 436, 467 (1966): "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves." Note, however, that *Miranda* still speaks of some degree of compulsion before the fifth amendment privilege is violated.

fourth amendment. It was indicated that legislation could be enacted to protect the secrecy of telephone messages by providing for the exclusion of intercepted messages from evidence in criminal trials. Subsequently in 1934, Congress enacted the Federal Communications Act and in the now famous section 605[12] provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."

Many commentators have attacked the notion that section 605 was in fact the response of Congress to the invitation of the Supreme Court in *Olmstead*.[13] It appears that the Act was passed with little debate or consideration of this section, and the clear purpose of the Act seems to be simply to create the Federal Communications Commission as a new governmental agency with powers to regulate the communications industry. The origin of section 605 is apparently to be found in section 27 of the Radio Act of 1927,[14] which may well have found its way into the 1934 Act merely by way of re-enactment. There seems to be no support for the view that Congress intended section 605 to operate as a ban on the use of wiretapping as a means of producing evidence for use in criminal trials.

The thirty-one words quoted above have, however, been lifted from their context in a statute containing some 20,000 words[15] and used to control the use of evidence obtained through wiretapping.[16] This approach was first used by the Supreme Court in 1937 in the first *Nardone* case.[17] Here it was held that section 605 applies to federal law enforcement officers as well as to any other person, and that the prohibition of "divulgence" forbids divulgence by use of the intercepted communication in evidence in a federal criminal trial. The Court, giving the statute a most literal interpretation, stated:

> the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear

[12] 48 Stat. 1064 (1934).

[13] See Rosenzweiz, *The Law of Wire Tapping*, 32 CORNELL L.Q. 514, 534 (1947); Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 174 (1952).

[14] 44 Stat. 1162 (1927).

[15] Anthony P. Savarese, Jr., Chairman of the New York State Legislative Joint Committee on Privacy of Communications, has described section 605 as "a brief, obscure, and undebated clause in that Act—truly a needle in a legislative haystack." Savarese. *Eavesdropping and the Law*, 46 A.B.A.J. 263, 336 (1960).

[16] At least one federal court summarily rejected the application of section 605 to wiretapping in the period shortly after the passage of the Federal Communications Act. Smith v. United States, 91 F.2d 556 (D.C. Cir. 1937).

[17] Nardone v. United States, 302 U.S. 379 (1937).

language that *"no person"* shall divulge or publish the message or its substance to *"any person."* To recite the contents of the message in testimony before a court is to divulge the message.[18]

As a result, the exclusionary rule, sought to be established by the *Olmstead* minority, was created by statutory interpretation of section 605 and applied to the federal courts, despite the fact that the Act itself contained no such exclusionary provision.[19] This decision dealt a double blow to the hopes of prosecutors and law enforcement officers. It had been contended that the Act did not by its terms apply to law enforcement officers and that they should, therefore, be excluded from its provisions entirely.[20] In addition, it had been argued that testimony in open court consisting of evidence of criminal conduct could not have been contemplated by Congress or such intent would have been spelled out clearly in the statute. It seems apparent that the philosophy of the *Olmstead* minority found a receptive audience in the *Nardone* court to the extent that the new statutory interpretation reached the result desired.[21]

Two years later, the second *Nardone* case[22] provided the Supreme Court with a vehicle to extend the newly created exclusionary rule to the "fruit of the poisonous tree."[23] Consequently, not only the communication intercepted by a wiretap, but also any evidence obtained as a result of information produced through the wiretap, must also be excluded from evidence in the federal courts.[24] This decision strikes directly at the great value of wiretaps as a means of producing leads for further investigative development.[25] If the source of the evidence

[18] *Id.* at 382.

[19] The Act provides a penalty of imprisonment for not more than one year (two years for subsequent convictions), and a fine not exceeding $10,000, or both, for "Any person who wilfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful . . . ." 47 U.S.C. 501. The frequent use of the exclusionary rule as a means of enforcement of constitutional provisions and statutes seems to indicate a feeling on the part of the Supreme Court that criminal penalties are ineffective to accomplish the purpose for which they were created. This is a serious denigration of the criminal law.

[20] 302 U.S. at 383-84.

[21] Mr. Justice Roberts described wiretapping as "inconsistent with ethical standards and destructive of personal liberty." *Id.* at 383.

[22] Nardone v. United States, 308 U.S. 338 (1939).

[23] This famous phrase was first used by Mr. Justice Frankfurter in this case.

[24] The Court thus made the wiretapping exclusionary rule co-extensive with the rule as applied in the search and seizure cases. See Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[25] It may be assumed, however, that law enforcement agencies continue to use wiretapping for this purpose. If the existence of a wiretap is never disclosed, the true source of any evidence so obtained will be unknown to the defense.

is tainted by the method of its production—wiretapping—then the evidence is inadmissible in a federal criminal trial.[26]

The next step was taken by the Supreme Court in the *Weiss* case,[27] where the application of section 605 was extended to intrastate communications making evidence of such communications obtained through wiretapping inadmissible in the federal courts.[28] This result closed an apparent gap in the law which would have allowed wiretapping and use of both a communication and its fruits where only a local conversation was involved.

The question of the defendant's standing to object to the introduction of evidence produced by wiretapping reached the Court in 1942. In the *Goldstein* case[29] the Supreme Court held that the protection provided by section 605 is personal to the participants in a telephone conversation, and only the participants in the intercepted conversation may object to its use in evidence. This principle has never been overruled and is presumably controlling today in the wiretapping area,[30] despite the fact that a different rule has been adopted in the search and seizure cases.[31] If the goal is to prohibit the use of all wiretap evidence through strict application of section 605, then there appears to be little justification for this arbitrary limitation. Any use of an intercepted communication would seem to constitute a "divulgence" under the interpretation of *Nardone I*[32] calling for the application of the exclusionary rule therein created.

On the same day, the Supreme Court held in the *Goldman* case[33] that the use of an electronic eavesdropping device,[34] without a trespass, whereby one side of a telephone conversation is overhead, does not

---

[26] For an excellent discussion of this rule see Bernstein, *The Fruit of the Poisonous Tree*, 37 ILL. L. REV. 99 (1942).

[27] Weiss v. United States, 308 U.S. 321 (1939).

[28] In this case the Government tapped a wire without the consent of either party. The recordings of the conversation were then used to force one of the parties to the conversation to consent to the divulgence of the contents of the intercepted message. The Court held such consent to be invalid under section 605. *Id.* at 329.

[29] Goldstein v. United States, 316 U.S. 114 (1942).

[30] See United States v. Gris, 247 F.2d 860 (2d Cir. 1957); Manger v. State, 214 Md. 71, 133 A.2d 78 (1957).

[31] See Jones v. United States, 362 U.S. 257 (1960). The reliance in the *Goldstein* case on the then existing law in the search and seizure cases, which has since been changed, makes it possible to draw a contrary conclusion, but so long as wiretapping cases are determined on a non-constitutional basis, cases based upon the fourth amendment are not necessarily controlling.

[32] 308 U.S. 338 (1939).

[33] Goldman v. United States, 316 U.S. 129 (1942).

[34] The device used was a "detectaphone."

violate either the fourth amendment or section 605.[35] This result represents an attempt to confine the application of section 605 to the typical wiretap situation where the interception is of both sides of the communication and is obtained by overhearing the conversation as it is transmitted through the telephone system. In the *Goldman* situation, all conversation taking place within the room could be heard through the electronic device. The fact that a portion of the conversation overheard happened to consist of one side of the telephone conversation was merely incidental. This is more properly an example of electronic eavesdropping which is considered hereafter.

The Consent Doctrine

With the increasing use of the telephone and the introduction of the telephone extension, it was only natural that cases would arise in which one party to a telephone conversation, without the knowledge of the other party, authorizes a third person to listen to the conversation by means of a telephone extension. Such a case was presented to the Supreme Court in *Rathbun v. United States*.[36] In a rather surprising departure from the philosophy of prior decisions, the Court held that section 605 forbids only those interceptions not authorized by the sender, and, therefore, when one party consents to allow a third person to overhear a telephone conversation, there is no "interception" under section 605, both caller and intended receiver being considered as "senders" under the Act.[37] This decision, of course, opens the door for one very common and important investigative technique whereby an informer makes a telephone call to a suspect and "consents" to police monitoring of the conversation, resulting in the production of

[35] The Court also held that the term interception "does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver," but rather refers to "the taking or seizure by the way or before arrival at the designated place." 316 U.S. at 134. For a complete discussion of the various interpretations of the term "interception," as used in section 605, see Bradley & Hogan, *Wiretapping: From Nardone to Benanti and Rathbun*, 46 GEO. L.J. 418 (1958). The problem of the meaning of the term "interception" has become secondary to the question of consent in later cases. Bradley & Hogan, *supra* at 434-41.

[36] 355 U.S. 107 (1957).

[37] The Court interjected somewhat of an assumption of risk theory: "Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation." *Id.* at 111.

[38] See Wilson v. United States, 316 F.2d 212 (9th Cir. 1963), *cert. denied*, 377 U.S. 960 (1964); United States v. Williams, 311 F.2d 721 (7th Cir. 1963). The *Wilson* case has achieved quite a degree of independent fame due to its characterization by the author of the opinion, Judge Carter, as "a small horse soon curried." 316 F.2d at 213.

incriminating statements.[38] Since the *Rathbun* case, the federal courts have expanded the consent doctrine so that it is now immaterial whether the conversation is recorded rather than overhead directly, or that the extension is installed for the specific purpose of overhearing the conversation,[39] rather than being a regularly installed extension as in *Rathbun.*

Free and Voluntary

Perhaps the major problem facing the courts in cases involving consent is to determine whether the consent given by the participant in the telephone conversation is actually a free and voluntary consent. This problem is built into the typical investigative use of the doctrine where an informer is the consenting participant in the conversation.[40] It has been held that an authorization to monitor a conversation is not involuntary if given in hope of leniency.[41] In so holding, the following standard was used:

> The Court would restrain the use of police coercion and of promises of leniency; and we would restrain the arm of the law from extending out into the community in search of the weak and the vulnerable who might be persuaded to authorize official monitoring of their telephone lines. We believe that the same strict standards which are required in order to validate a consent to a search and seizure should apply to a consent to intercept a telephone conversation.[42]

The situation in which an undercover agent or voluntary informant allows the monitoring or recording of his telephone conversations presents few problems. This is routine and merely a method of preserving accurately the terms of the conversation to which the agent or informant could freely testify in court.[43] The problem of the voluntary nature of the consent arises primarily from the prevalent police practice of using informers as decoys after their arrest.[44] The pressures exerted upon such a person are obvious, and this tends to throw doubt upon the voluntary nature of the consent in such cases. It ap-

---

[39] Wilson v. United States, *supra* note 38; Ferguson v. United States, 307 F.2d 787 (10th Cir. 1962).

[40] This practice has become standard procedure in narcotics investigations.

[41] United States v. Zarkin, 250 F. Supp. 728 (D.D.C. 1966).

[42] *Id.* at 737.

[43] Recordings are frequently used to refresh the recollection of a participant in a conversation prior to trial. See Monroe v. United States, 234 F.2d 49, 57 (D.C. Cir. 1956), *cert. denied,* 352 U.S. 873 (1956).

[44] See McClure v. United States, 332 F.2d 19 (9th Cir. 1965); United States *ex rel.* Dixon v. Pate, 330 F.2d 126 (7th Cir. 1964).

pears certain that this problem will receive additional attention from the courts in the future.

The Pen Register

In many investigative situations it is not enough to overhear a particular telephone conversation. This is particularly true where the identity and location of the other party to the conversation are unknown. To provide at least a part of this information, law enforcement officers have made use of a device known as the pen register. This device has no capability for overhearing or reproducing a telephone conversation, but does record on paper dashes equal to the telephone number dialed on a telephone line to which the device has been connected.[45] With the telephone number available for each call made from a particular telephone, the law enforcement agency has a ready made list of the locations called,[46] which is a long step toward identification of the associates of the caller. At least one federal court[47] has held that the use of the pen register, without the consent of the subscriber, is a violation of section 605 inasmuch as the existence of a communication is thereby divulged. This holding appears to represent an unduly strict interpretation of section 605 by apparently ignoring the fact that the pen register has no relationship to a communication sent over the telephone lines, and, as a matter of fact, does not indicate whether or not a call is ever completed. It is doubtful that a communication exists until a conversation begins between the parties, and on this basis there should be no violation of the provisions of section 605.[48]

As a part of the ordinary accounting practice of telephone companies, a record is maintained of the date, numbers called, and duration

[45] Devices are also available to provide numbers called from the new push button phones.

[46] This result is accomplished simply by referring to a "reverse listing" directory in which the listings are by number rather than by subscriber. Such directories are readily available in most areas.

[47] United States v. Guglielmo, 245 F. Supp. 534 (N.D. Ill. 1965). In this case the pen register was installed by the telephone company at the request of internal revenue agents. The court summarily disposed of the government's contention that the defendant had consented to such action by the telephone company by requesting the installation of telephone service, saying: "Recording calls by use of the pen register is only an occasional service of Illinois Bell Telephone Company and not a practice generally known to and accepted by its subscribers or published in its tariffs." *Id.* at 536.

[48] People v. Schneider, 45 Misc. 2d 680, 257 N.Y.S.2d 876 (Sup. Ct. 1965), held that the use of a pen register did not violate either defendant's right of privacy or section 605 of the Federal Communications Act. *Cf.* Schmukler v. Ohio Bell Tel. Co., 116 N.E.2d 819. (Ohio Com. Pl. 1953).

of all long distance calls made from each telephone. It has been held that section 605 does not apply to telephone company accounting employees, and therefore such employees may disclose the existence of telephone listings, including private listings, and accounting records giving the above information.[49] With reference to long distance calls, therefore, all of the information which might be obtained through the use of a pen register, and more, is readily available and admissible in evidence if otherwise qualified.

The "Beep" Tone Signal

Americans today, particularly in the business community, have become familiar with a "beep" tone signal on telephone lines indicating that the conversation is being recorded. This signal is not required either by statute or by regulation of the Federal Communications Commission, but is merely a prerequisite to approval of telephone tariffs governing the use of automatic recording devices maintained by the telephone company.[50] The one decision[51] considering this matter indicates that the failure to provide this tone signal will not preclude the introduction of evidence obtained by recording a conversation with the consent of one party.

Interception without Divulgence

There remains one major unanswered question in the wiretapping area. Section 605 prohibits the interception and disclosure of the contents of any communication by wire, but does the Act prohibit interception alone without divulgence? The Supreme Court has specifically left this question open.[52] The Department of Justice has for many years taken the position that section 605 does not prohibit wiretapping as such, but only the disclosure or use for personal benefit of information so obtained.[53] As a result of this interpretation wiretapping has been

[49] *E.g.*, United States v. Russo, 250 F. Supp. 55, 59 (E.D. Pa. 1966); United States v. Gallo, 123 F.2d 229, 231. (2d Cir. 1941).

[50] The final order of the Federal Communications Commission of November 26, 1947 (as amended May 20, 1948), 12 F.C.C. 1005-09, permits the use of recording devices in connection with foreign and interstate telephone service, when maintained by the telephone company, upon the condition that the "use is accompanied by adequate notice to all parties to the telephone conversation that the conversation is being recorded . . . by the use of an automatic warning device, which will automatically produce a distinct signal that is repeated at regular intervals during the course of the telephone conservation when the recording device is in use."

[51] United States v. Zarkin, 250 F. Supp. 728, 738 (D.D.C. 1966) (by implication).

[52] Benanti v. United States, 355 U.S. 96, 100 n.5 (1957); Rathbun v. United States, 355 U.S. 107, 108 n.3 (1957).

[53] Except for a brief period in 1940, this has been the consistent position of the

and is conducted by the Federal Bureau of Investigation, and presumably by other federal law enforcement agencies as well,[54] but only with the personal authorization of the Attorney General. The Department has also taken the position that internal disclosure within the Department of Justice does not constitute a divulgence within the meaning of section 605.[55] Although the information obtained by wiretaps without the consent of one party may not be used as evidence, the wiretap is relied upon in certain cases[56] as an important investigative weapon providing important leads for further development by customary investigative methods.

This, of course, raises once again the prohibition against the use of the fruits of wiretapping established in the second *Nardone*[57] case. If it can be established that evidence constituting fruits of illegal wiretapping is being offered by the prosecution, *Nardone II* applies and the evidence should be suppressed. The difficulty lies in establishing wiretapping as the origin of the evidence. *Nardone II* recognized this problem and established a procedure which hopefully would allow a defendant to raise this question. The basic requirement is that the defendant establish in the first instance to the satisfaction of the trial judge that wiretapping was in fact used by the investigative authorities in his case.[58] This fact should be established by filing a motion to suppress the particular evidence complained of prior to trial. Unless

Department of Justice. See Katzenbach, *An Approach to the Problems of Wiretapping*, 32 F.R.D. 107 (1963). Some case support for this view is found in United States v. Coplon, 91 F. Supp. 867, 871 (D.D.C. 1950), *rev'd on other grounds*, 191 F.2d 749 (D.C. Cir. 1951): "The congressional act [section 605] as construed by the Supreme Court does not make wire-tapping an offense, but the interception and disclosure of the contents of the message constitute the crime. Both acts are essential to complete the offense."

[54] It has been suggested that the Treasury Department may hold a different view, however. See Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 YALE L.J. 799, 802 (1954).

[55] See Katzenbach, *supra* note 50; Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792 (1954); Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195 (1954).

[56] According to the Attorney General, the Federal Bureau of Investigation is authorized to tap wires only in cases involving national security or human life. Katzenbach, *supra* note 50, at 108.

[57] 308 U.S. 338 (1939).

[58] "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established . . . the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." Nardone v. United States, *supra* note 57, at 341.

the defendant has had no earlier opportunity in the particular situation to make such a motion, no such motion to suppress should be allowed during trial. At the hearing on the motion, if the defendant is successful in establishing that a wiretap was used, and this must be shown by specific facts,[59] then the burden is upon the prosecution to show that the evidence in question has an origin independent from the wiretap.[60] In the usual situation, this burden requires the prosecution to disclose the nature of its case, and thus presents the defense with a most valuable discovery device quite apart from the decision on the motion.

It is doubtful whether this procedure is generally effective to disclose the use of wiretap information or its fruits. In the usual case, the defense is working in the dark. There may be a strong suspicion that wiretapping was employed in the preparation of the particular case, but this is not sufficient. If the wiretap was installed and operated with the care generally used in such cases, it should remain undetected. If care is exercised in the use of the information obtained, it may not be at all apparent that a wiretap set in motion the events leading to the prosecution of the defendant. If the law enforcement agency involved is careful to conceal the fact that a wiretap was employed, this information may never come to the attention of the defense. Perhaps this is unavoidable, but so long as the prohibition on the use of nonconsensual wiretap information and its fruits exists, it seems only proper that defendant should be permitted to discover this fact. Since the prosecution should not be using this type of evidence as the law presently stands, should not the defense be allowed to satisfy its burden by requiring the prosecution to respond under oath to an interrogatory requesting whether a wiretap was employed in the investigation of the case?

The Law in Federal Courts

Despite the qualms expressed by both commentators and courts as to the propriety and wisdom of the use of wiretapping as an investigative tool, the law in the federal courts is quite clear. Wiretapping unaccompanied by a "physical invasion of the premises" does not violate the fourth amendment.[61] Wiretapping without the consent of one of the parties to a telephone conversation does violate section 605

---

[59] See United States v. Frankfeld, 100 F. Supp. 934 (D. Md. 1951). Such hearings are generally referred to as "Nardone hearings."

[60] See United States v. Costello, 171 F. Supp. 10 (S.D.N.Y. 1959).

[61] Olmstead v. United States, 277 U.S. 438, 466 (1928).

of the Federal Communications Act,[62] and evidence of the conversation, as well as any evidence constituting fruits of the conversation, may not be admitted in a criminal trial in the federal courts.[63] Only a party to a tapped conversation may object to the introduction of evidence obtained through wiretapping.[64] The consent to monitor or record a telephone conversation which will permit the use of such information in evidence must be given freely and voluntarily.[65] If the defendant in a federal criminal case is to raise the question of the use of evidence obtained through illegal wiretapping, he must file a motion to suppress such evidence and establish that a wiretap was employed in the investigation of his case. If he succeeds in establishing this point, then the prosecution must proceed to show that the evidence complained of had an origin independent of the wiretap,[66] or all such evidence must be suppressed.

The Law in State Courts

The situation becomes much more complicated when the state law concerning wiretapping is under consideration. The reason for this is, of course, the interaction of section 605 of the Federal Communications Act with particular state laws.

As early as 1952, the Supreme Court was faced with the problem of whether or not the exclusionary rule created in the federal courts for violation of section 605 should be extended to the state courts. In *Schwartz v. Texas*[67] the Court concluded that section 605 does not contain "a clear manifestation" of the intention of Congress to render inadmissible in state courts evidence obtained by wiretapping. This is hardly surprising in light of the fact that no such "clear manifestation" appears in the Act with reference to the federal courts, but nevertheless the Court reaffirmed the application of the exclusionary rule in the federal courts. While some authorities believe that *Mapp v. Ohio*[68] has destroyed the vitality of the *Schwartz* ruling,[69] there is no such case

[62] Rathbun v. United States, 355 U.S. 107 (1957); Nardone v. United States, 302 U.S. 379 (1937).

[63] Nardone v. United States, 308 U.S. 338 (1939); Nardone v. United States, 302 U.S. 379 (1937).

[64] Goldstein v. United States, 316 U.S. 114 (1942).

[65] See Blanchard v. United States, 360 F.2d 318 (5th Cir. 1966); United States v. Ballou, 348 F.2d 467 (2d Cir. 1965); United States v. Kountis, 350 F.2d 869 (7th Cir. 1965), *cert. denied*, 382 U.S. 980 (1966).

[66] Nardone v. United States, 308 U.S. 338 (1939).

[67] 344 U.S. 199 (1952).

[68] 367 U.S. 643 (1961) (excluding evidence in state courts where obtained in violation of fourth amendment).

[69] See, *e.g.*, Allen, *The Exclusionary Rule in the American Law of Search and*

authority up to the present time.[70] In order to justify extending the exclusionary rule to the states under the rationale of *Mapp*, it would be necessary to establish wiretapping as a constitutional violation, a proposition specifically rejected in the *Olmstead* case and subsequent rulings. Consequently, it is unlikely that the Court would indirectly accomplish this result.

Subsequent developments in the law relating to the use of wiretapping evidence in state courts have been primarily concerned with the effect of state statutes permitting wiretapping. In general, state statutes concerning wiretapping may be divided into two categories: those permitting wiretapping with or without official authorization,[71] and those flatly prohibiting wiretapping by all persons, including law enforcement officers.[72]

The New York Practice

New York is the most well known of the states permitting wiretapping, and here the authority is granted not only by statute,[73] but also by specific constitutional provision.[74] Under the New York procedure, law enforcement officers may obtain a wiretap order from a judicial officer by presenting affidavits or sworn testimony which will satisfy the judge that there is reasonable ground to believe that evidence of crime may be obtained through the tapping of described telephone lines. In a recent decision,[75] the New York Court of Appeals has held that supporting testimony under oath is not required if the affidavits filed are sufficient to satisfy the judge of the existence of probable cause; but if the affidavit is insufficient for this purpose, additional

Seizure, 52 J. CRIM. L., C. & P.S. 246, 254 (1961): "the holding in *Schwartz v. Texas*, which permitted the states to admit wiretap evidence in state proceedings, was based in significant part on the analogous authority of *Wolf v. Colorado* (338 U.S. 25 (1949)). That authority has now been overturned."

[70] In Williams v. Ball, 294 F.2d 94 (2d Cir. 1961), Judge Friendly said: "We do not read Mapp v. Ohio, 1961, 367 U.S. 643, as overruling sub silentio Schwartz v. State of Texas—on which six Justices had expressly relied, only four months earlier, in the per curiam affirmance . . . of our decision in Pugach v. Dollinger, 2 Cir. 1960, 277 F.2d 739. . . . We find no basis in Mapp for extending its application to a state's receiving evidence the divulgence of which would violate a Federal statute." *Id.* at 96.

[71] Approximately twenty-six states are in this category. See Criminal Law Comment, *Wiretapping: The State Law*, 51 J. CRIM. L., C. & P.S. 534, 538 n.26 (1961), for a listing of these states.

[72] Approximately nine states are in this category. See Criminal Law Comment, *supra* note 71, at 538 n.23.

[73] N.Y. CODE CRIM. PROC. § 813a.

[74] N.Y. CONST. art. I, § 12.

[75] People v. McCall, 17 N.Y.2d 152, 216 N.E.2d 570, 269 N.Y.S.2d 396 (1966).

examination must be made of the affiant under oath, and when probable cause is doubtful or indefinite from the affidavits, additional examination should be made. In other words, substantially the same safeguards are attached to the issuance of a wiretap order as are required for the issuance of a search warrant.

Since there is no exception in section 605 permitting wiretapping by state officers, even under the terms of a court order, every time a state officer acting under the terms of a wiretap order makes a tap and testifies in a state criminal trial as to the information thus obtained, he is violating federal law. This is the problem which has bedeviled the courts, both state and federal, and there appears to be no satisfactory solution in view. In its first consideration of this situation, the Supreme Court held[76] that evidence obtained by state officers acting under a state wiretap order is inadmissbile in a federal criminal trial, the evidence being obtained in violation of section 605.

Since wiretapping by state law enforcement officers, even under the terms of a valid state court order, was held to be a violation of federal law, defendants desperately sought a method to prevent the use of evidence so obtained in state criminal trials. Faced with the refusal of the Supreme Court in the *Schwartz* case[77] to create an exclusionary rule applicable to the states, defense attorneys attempted to block the introduction in state criminal trials of evidence which had been obtained by a violation of federal law by use of the injunction device in federal court. Once again the Supreme Court was asked to consider the problem, but the result was merely a per curiam decision,[78] the effect of which was to hold that a defendant may not obtain a federal injunction against a prosecutor proceeding in a state case in which wiretap evidence might be used.[79] As a result, a defendant has no remedy against the use in a state court of evidence obtained through the use of state authorized wiretapping, despite the fact that the action of the state officers constitutes a violation of section 605.

Faced with this closed door, the next effort was to attempt to induce the New York courts to create an exclusionary rule which would prevent the use of evidence obtained in violation of the federal

---

[76] Benanti v. United States, 355 U.S. 96 (1957).

[77] Schwartz v. Texas, 344 U.S. 199 (1952).

[78] Pugach v. Dollinger, 365 U.S. 458 (1961), *affirming* 277 F.2d 739 (2d Cir. 1960). The same result was reached in Voci v. Storb, 235 F.2d 48 (3d Cir. 1956). See Stefanelli v. Minard, 342 U.S. 117 (1951), *affirming* 184 F.2d 575 (3d Cir. 1950).

[79] Attempts to utilize the declaratory judgment procedure have also failed. Lebowich v. O'Connor, 309 F.2d 111 (2d Cir. 1962); Williams v. Ball, 294 F.2d 94 (2d Cir. 1961).

law. In a four to three decision,[80] the New York Court of Appeals refused to do so, despite a strong dissent by Justice Fuld to the effect that "the imperative of judicial integrity," the purposes of the exclusionary rule, and the necessity to avoid commission of a criminal act in the courtroom require a revision of the New York rule. The effect of these Supreme Court rulings has been felt at the trial court level, however. As a result of the *Benanti* case,[81] at least two New York judges[82] have refused to issue wiretap orders on the ground that to do so would make the court a participant in a federal crime. Other than this, wiretap orders are being issued in New York, and the results are being admitted into evidence in criminal trials[83] without any prosecutions being forthcoming from the federal authorities for violation of section 605—a distasteful and unhappy situation which could be corrected by a simple amendment to section 605 excluding acts by state officers under the terms of a valid state court order.[84] The failure of Congress to act in this matter can only be attributed to an unwillingness to become involved in the controversy surrounding the whole question of authorized wiretapping.[85]

A warning has been sounded by Judge Medina that the federal courts may overturn the New York practice on quite a different basis:

> While I agree that there seems to be little likelihood that the rule of *Schwartz v. Texas* . . . will be changed, at least in the foreseeable future, it may well be that we are here dealing with something more than a state rule of evidence to the effect that evidence illegally obtained is admissible if relevant to the case and otherwise unobjectionable. The very fact that the State of New York not only has formulated through its courts a rule of evidence, but has also established and maintained, in its Constitution and legislation, a system

[80] People v. Dinan, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962), *cert. denied*, 371 U.S. 877 (1962).

[81] Benanti v. United States, 355 U.S. 96 (1957).

[82] See In The Matter of Interception of Telephone Communications, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958); Application for Order Permitting Interception of Telephone Communications, 23 Misc. 2d 543, 198 N.Y.S.2d 572 (Ct. Gen. Sess. 1960).

[83] This result is clearly indicated by People v. McCall, 17 N.Y.2d 152, 269 N.Y.S.2d 396, 216 N.E.2d 570 (1966).

[84] For a complete discussion of statutory possibilities for the correction of this problem, see Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165 (1952). Compare Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157 (1954).

[85] Almost every session of Congress sees the filing of one or more bills designed to correct this situation. Extensive hearings have been held, but no concrete action appears to be forthcoming.

> of wiretapping that is persistently and continuously in operation through orders of New York judges authorizing the wiretapping and through New York enforcement officers who do the wiretapping and then divulge the wiretaps in testimony before Grand Juries and petit juries, all despite the ruling of the Supreme Court in Benanti . . . to the effect that the entire system is illegal and in violation of . . . [section 605], and despite the Supremacy Clause, Article VI, Clause 2, U. S. Constitution, may well constitute an invasion of appellant's constitutional right to due process under the Fourteenth Amendment.[86]

The Practice in Other States

While the Supreme Court has apparently left the states free to choose whether or not they will adopt an exclusionary rule to apply to evidence obtained through wiretapping,[87] most states have not as yet considered the problem.[88] To avoid the necessity of judicial establishment of an exclusionary rule, some states, such as California,[89] have adopted the rule by statute. This would seem to be the clearest method of expressing the policy of a particular state.

Michigan[90] and Pennsylvania[91] have held that the receiver of a telephone message has a right to record the message without notice to the other party, and that evidence so obtained is admissible in a criminal trial.

Following the federal cases interpreting section 605, Pennsylvania has also held that the act of overhearing a telephone conversation with the consent of one party is not a violation of the Pennsylvania statute

[86] Judge Medina concurring in United States v. McMann, 275 F.2d 284, 286 (2d Cir. 1960). For a view that wiretapping violates the first amendment, see King, *Wire Tapping and Electronic Surveillance: A Neglected Constitutional Consideration*, 66 DICK. L. REV. 17 (1961).

[87] Schwartz v. Texas, 344 U.S. 199 (1952).

[88] See Criminal Law Comment, *supra* note 71, at 540.

[89] CAL. PEN. CODE § 653; (d) provides: "Except as proof in a suit or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding."

[90] People v. Maranian, 359 Mich. 361, 102 N.W.2d 568 (1960).

[91] Commonwealth v. Bruno, 203 Pa. Super. 541, 201 A.2d 434 (1964), *cert. denied*, 379 U.S. 965 (1965). The court found no violation of PA. STAT. ANN. tit. 15, § 2443 (1957), in the recording of a telephone message by the rightful receiver. The statute provides: "No person shall intercept a communication by telephone or telegraph without the permission of the parties to such communication. No person shall install or employ any device for overhearing or recording communications passing through a telephone or telegraph line with intent to intercept a communication in violation of this act. No person shall divulge or use the contents or purport of a communication intercepted in violation of this act . . . ."

prohibiting wiretapping.[92] The same result has been reached under the California statute.[93]

In gambling cases it is not unusual for police officers engaged in a lawful search to answer a telephone call made to the premises and to use the conversation as evidence of the violation of the gambling laws. This practice is not held to be a violation of either section 605 or state wiretap statutes on the basis that there is no interception of a communication, but only proper police action.[94]

In general, it can be said that in those states with statutes prohibiting wiretapping, evidence which might be obtained in this manner will be excluded from evidence both on the basis of section 605 of the Federal Communications Act and the state statute. In those states not having a statute prohibiting wiretapping, presumably the exclusionary rule would be applied in reliance on section 605 as interpreted in the first *Nardone* case.[95] As for those states authorizing controlled wiretapping, such as New York, absent a reversal of the *Schwartz* doctrine, they remain free to admit as evidence in their criminal trials the information obtained by proper use of their statutes.[96]

Electronic Eavesdropping

One of the unsuspected but very welcome by-products of World War II has been the tremendous development in electronic equipment. This equipment, developed to a great extent for espionage and counter-espionage use, found a natural post-war use in law enforcement activ-

[92] Commonwealth v. Murray, 206 Pa. Super. 298, 213 A.2d 162 (1965). The court reached this result on the theory that no interception was involved in the overhearing of a telephone conversation on an extension phone.

[93] People v. La Peluso, 239 Cal. App. 2d 792, 49 Cal. Rptr. 85 (1966); People v. Fontaine, 237 Cal. App. 2d 320, 46 Cal. Rptr. 855 (1965). Illinois has recently determined that the Illinois Eavesdropping Act, ILL. CRIM. CODE § 14, which applies to wiretapping, requires the exclusion of evidence obtained through eavesdropping without the consent of all of the parties. People v. Kurth, 34 Ill. 2d 387, 216 N.E.2d 154 (1966).

[94] Leogrande v. State Liquor Authority, 25 App. Div. 2d 225, 268 N.Y.S.2d 433 (1966); United States v. Pasha, 332 F.2d 193 (7th Cir. 1964), *cert. denied*, 379 U.S. 839 (1964).

[95] Nardone v. United States, 302 U.S. 379 (1937).

[96] It should be noted, however, that three members of the Supreme Court, dissenting in the most recent consideration of the eavesdropping problem, Lopez v. United States, 373 U.S. 427 (1963), indicated a readiness to overrule Olmstead v. United States, 277 U.S. 438 (1928), thus making wiretapping a violation of constitutional rights to privacy created by the interaction of the fourth and fifth amendments. Such a ruling would require the exclusion of wiretapping evidence in state courts under the doctrine of Mapp v. Ohio, 367 U.S. 643 (1961).

ity, and has operated as a great stimulus for the development of even more sophisticated listening devices.[97] Today, it is indeed a rare American home that is not equipped with many modern electronic devices from broilers to television sets. This domestic wonderland is taken much for granted today, but it is certainly true that the average American little understands the "how" of his electronic wonders. Perhaps the general attitude is one of open-mouthed awe at the constant flow of magic produced by modern science. This awe tends to turn to fear of the many publicized uses of electronic equipment on the part of law enforcement agencies.[98]

The law enforcement use of electronic eavesdropping devices is merely a part of the constant effort to improve all equipment used for the prevention and detection of crime.[99] The electronic aids are used primarily as an extension of the senses of sight and hearing making it possible for an officer to see and hear what would be impossible with the naked eye and ear. With this improved ability comes, as a matter of course, better and more efficient law enforcement.

The philosophical question presented, and much debated today, is whether the undoubted improvement in law enforcement is bought at too high a price in terms of the resulting loss of individual privacy. It should be emphasized that no one claims a right to remain free from police surveillance, including eavesdropping, in order to enable him safely to commit acts prohibited by society through the criminal laws. It is equally true that no one desires to impinge on the constitutional rights of any person, be he saint or sinner. That some difficulty has arisen in squaring these two truisms can be charged to the absence of a clear delineation of the nature and extent of the constitutional right to privacy. The Supreme Court has not as yet undertaken a compre-

[97] See generally BRETON, THE PRIVACY INVADERS (1964); DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS (1959).

[98] This article is limited to a consideration of the problems created by law enforcement use of electronic and other eavesdropping devices. The general availability of eavesdropping equipment creates a much more serious problem in the non-official use of such equipment. For examples of such uses of eavesdropping equipment, see Lipset, *The Wiretapping-Eavesdropping Problem: A Private Investigator's View*, 44 MINN. L. REV. 873 (1960); Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1191 (1965).

It would seem clear that such non-official use of eavesdropping equipment should be prohibited and punished. It is only in the law enforcement use of eavesdropping that a viable justification exists.

[99] The many developments in communications and scientific methods of investigation and identification are examples of the vast improvement in law enforcement equipment, methods, and operations.

hensive discussion or definition of the right to privacy,[100] a right not spelled out in the Constitution. Nor has Congress chosen to enact legislation in this area,[101] which would seem to be the best hope for stability and certainty in the future.

The methods of electronic eavesdropping available for law enforcement use today stagger the imagination, ranging from the rather conservative concealed microphones and recorders to the now-famous "olive" capable of broadcasting conversations from the luxurious depths of a martini.[102] One of the most serious legal questions presented today is whether the law expounded by the Supreme Court in considering the use of relatively simple electronic devices is adequate to control the very sophisticated devices in use today and those on the drawing board for tomorrow. The difficult case-by-case development of the law in such a fast developing scientific area tends to create a time lag calling urgently for statutory treatment.

The Goldman-Silverman Rationale

The Supreme Court first really considered the electronic eavesdropping situation in the *Goldman* case,[103] holding admissible in evidence in the federal courts evidence produced through the use of an electronic eavesdropping device[104] without any physical trespass. In specifically holding that such means of obtaining evidence does not violate the fourth amendment, the Court reached a result similar to

---

[100] Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478 (1928), said: "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." See the dissent of Mr. Justice Brennan in Lopez v. United States, 373 U.S. 427, 446 (1963).

In Griswold v. Connecticut, 381 U.S. 479 (1965), a state statute forbidding the use of contraceptives was held to violate the fourteenth amendment. The Court discussed the "right of privacy" enjoyed by married couples, and remarked that the first amendment "has a penumbra where privacy is protected from governmental intrusion." *Id.* at 483. The Court also implied that the "right of privacy" is one of those rights retained by the people under the ninth amendment. See generally Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212; Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

[101] Congress is presently conducting hearings concerning eavesdropping, and has in the past conducted extensive hearings, but no specific action has been forthcoming.

[102] For an excellent recent discussion of the methods and technology of eavesdropping, see Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1004-10 (1966).

[103] Goldman v. United States, 316 U.S. 129 (1942).

[104] The device in question was a "detectaphone" listening device installed on the outer wall of the room.

that in the wiretrap cases.[105] While section 605 has been interpreted as requiring the application of an exclusionary rule in the wiretap cases,[106] the Federal Communications Act has no application to cases not involving the interception of telephone and telegraph communications, and no comparable federal statute has been enacted to apply to eavesdropping cases.[107] As a result, the rule of the *Goldman* case is the basic law in the electronic eavesdropping cases today.

It was not until the *Silverman* case,[108] almost twenty years later, that the Supreme Court was presented with the opportunity to examine and refine the trespass concept which had been carefully excluded in formulating the rule allowing the use of evidence obtained by means of electronic eavesdropping. Here a "spike mike" had been inserted by government agents into a party wall, making contact with a heating duct in the adjacent house, turning the entire heating system into a conductor of sound, and enabling the agents to overhear incriminating conversations which were then used as evidence. The Court held that this evidence was gathered in violation of the fourth amendment and must therefore be excluded from use in a federal criminal trial.[109] The decision was based not upon any local rules of trespass to property, but rather focused upon the "reality of an actual intrusion into a constitutionally protected area."[110]

Silverman is not at odds with the *Goldman* rule, but is rather a delimitation of the scope of that doctrine. Clearly, if the method of accomplishing electronic eavesdropping is by means of a trespass, the fourth amendment is violated and the resulting evidence, as well as any evidence constituting fruits of the illegal conduct, must be excluded from use in both federal and state criminal trials. The effect of *Silverman* is to refine the term "trespass" as used in the *Goldman* rule to mean "actual intrusion into a constitutionally protected area." Absent such an intrusion, evidence procured through electronic eavesdropping will be admissible in the federal courts, assuming, of course,

105 Olmstead v. United States, 277 U.S. 438 (1928).

106 Nardone v. United States, 302 U.S. 379 (1937).

107 The Federal Communications Commission has recently banned the use of radio transmitting microphones for eavesdropping purposes without the consent of both parties to the conversation, but the ban does not apply to "operations of any law enforcement officers conducted under lawful authority." 31 Fed. Reg. 3400 (March 1966), amending 47 C.F.R. § 15.11 (1966).

108 Silverman v. United States, 365 U.S. 505 (1961).

109 As a result of Mapp v. Ohio, 367 U.S. 643 (1961), such evidence gathered in violation of the fourth amendment must likewise be excluded from use in state criminal trials.

110 Silverman v. United States, 365 U.S. 505, 512 (1961).

that such evidence satisfies the other requirements of the law of evidence.

The "actual intrusion" element of the rule is normally referred to as physical penetration. Any physical penetration, no matter how small or insignificant, will constitute a violation of the fourth amendment resulting in the exclusion of the evidence so obtained. In *Silverman*, although the result was great, the actual penetration was slight. In another "spike mike" case[111] the penetration into the wall was no greater than that made by a thumb tack, but this was sufficient to constitute a violation of the fourth amendment. Even the lowering of a microphone down an air shaft opposite a grille in an apartment has been held to amount to a prohibited physical penetration where the air shaft was physically located within the area of the apartment.[112] Certainly, if the eavesdropping equipment is installed during the course of an actual physical unauthorized entry, the result will be exclusion of any evidence so produced,[113] but this method of operation appears to be only a relic of the past. Equipment presently available to law enforcement officers obviates the necessity of making any such entry or penetration, and it should be a rare occasion today when such antiquated methods are used. This fact seems to leave the rule of the *Silverman* case operating in a vacuum. The cases in which the courts have considered the use of modern electronic devices requiring no physical penetration have uniformly followed the *Goldman* rule and allowed the product of the eavesdropping to be introduced into evidence.[114]

The "constitutionally protected area" referred to in *Silverman* relates to those areas which have been held in the general search and seizure cases to be within the protection of the fourth amendment, such as houses, automobiles, offices, and hotel rooms. Of particular interest is the apparent exclusion of jails from the protection of the

---

[111] Clinton v. Virginia, 377 U.S. 158 (1964), *reversing per curiam* 204 Va. 275, 130 S.E.2d 437 (1963).

[112] Cullins v. Wainwright, 328 F.2d 481 (5th Cir. 1964).

[113] In Irvine v. California, 347 U.S. 128 (1954), state officers made an unauthorized physical entry into defendant's house and installed a microphone. The evidence obtained by this "almost incredible" police conduct was used to convict defendant in the state courts. The Supreme Court held that the police conduct violated the fourth and fourteenth amendments, but refused to exclude the evidence so obtained under the rule of Wolf v. Colorado, 338 U.S. 25 (1949). Such evidence would be excluded today under the rule of Mapp v. Ohio, 367 U.S. 643 (1961), and Wong Sun v. United States, 371 U.S. 471 (1963). See People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

[114] *E.g.*, People v. Anderson, 145 Cal. App. 2d 201, 302 P.2d 358 (1956) (hearing aid device); People v. Graff, 144 Cal. App. 2d 199, 300 P.2d 837 (1956) (Fargo amplifier).

fourth amendment[115] as it has been a traditional technique to wire for sound both cells and interview rooms.

Concealed Microphones and Recorders

Another phase of the eavesdropping problem, one that is not technically electronic eavesdropping at all, concerns the use of concealed microphones and recorders. This situation is most frequently found where an informer or undercover agent is equipped with electronic equipment for the purpose of transmitting and/or recording conversations with a suspect. The equipment in use today is easily concealed and capable of high performance. The benefits to law enforcement agencies of the use of such equipment are many. In some circumstances such equipment provides a desirable check on the actual activities of an informer; in all situations a verbatim record of entire conversations is possible. It is true that this is clandestine equipment and trickery is involved in its use. It is equally true that any party to a conversation may testify to its contents, and the electronic equipment makes available a more complete and accurate version of the conversation than would otherwise be possible.

The first of these cases to come before the Supreme Court resulted in a five to four decision[116] upholding the introduction of evidence obtained through radio transmission of a conversation. The Court finding no physical intrusion by the informer equipped with a concealed transmitter found no violation of the fourth amendment. In the particular case, the informer did not testify himself, but rather a government agent was allowed to testify as to the contents of the conversation as overheard on a radio receiver. Such a case does not represent the traditional secret listening to a conversation between two unsuspecting persons, but involves the active collaboration of one of the parties to the conversation—the equivalent of the consent to monitor cases in the wiretapping area.[117] The Court equated this use of electronic eavesdropping equipment with any other permissible police stratagem,[118] and despite a strong dissent by Mr. Justice Frankfurter,[119]

[115] See Lanza v. New York, 370 U.S. 139 (1962); United States v. Kahn, 251 F. Supp. 702 (S.D.N.Y. 1966); People v. Morgan, 197 Cal. App. 2d 90, 16 Cal. Rptr. 838 (1961), *cert. denied*, 370 U.S. 965 (1962).

[116] On Lee v. United States, 343 U.S. 747 (1952).

[117] See Rathbun v. United States, 355 U.S. 107 (1957).

[118] The Court stated: "We think the administration of justice is better served if stratagems such as we have here (the use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business') are regarded as raising, not questions of law, but issues of credibility. We cannot say that testimony such as this shall, as a matter of law, be refused all hearing." 343 U.S. at 757-58.

[119] Mr. Justice Frankfurter believed that sanctioning such "dirty business" "makes

refused to adopt any "finespun doctrines for exclusion of evidence."[120]

The same type of problem, this time involving a concealed pocket wire recorder, returned to the Supreme Court in *Lopez v. United States*,[121] the most recent consideration of electronic eavesdropping by the Court. The majority of the Court followed its prior holding in *On Lee*,[122] and since the government agent using the device was present at the conversation with the consent of the defendant, no violation of the fourth amendment was found and the recording was held to be admissible in evidence.[123] *Lopez* represents, on its face, simply an adherence to the *On Lee* view that if a participant to the conversation can, and in this case did, testify as to the contents of the conversation, then it is only reasonable to allow the best possible evidence of the conversation—the verbatim recording. In all of these cases one person is placing personal reliance upon one with whom he chooses to discuss criminal matters. If his choice is unfortunate, this is but a risk one must take. The Court has never gone so far as to exclude evidence

for lazy and not alert law enforcement. It puts a premium on force and fraud, not on imagination and enterprise and professional training. . . . [T]hese short-cuts in the detection and prosecution of crime are as self-defeating as they are immoral. . . . Such encouragement to lazy, immoral conduct by the police does not bode well for effective law enforcement. Nor will crime be checked by such means." 343 U.S. at 761-62.

120 Frank, J., dissenting in the Court of Appeals, United States v. On Lee, 193 F.2d 306, 313-14 n.17 (1951), made the following often-quoted analysis of the problem: "A dictaphone, by its very nature, conducts an exploratory search for evidence of a houseowner's guilt. Such exploratory searches for evidence are forbidden, with or without warrant, by the Fourth Amendment. . . . A search warrant must describe the things to be seized, and those things can be only (1) instrumentalities of the crime or (b) [*sic*] contraband. Speech can be neither. A listening to all talk inside a house has only one purpose—evidence gathering. No valid warrant for such listening or for the installation of a dictaphone could be issued. Such conduct is lawless, an unconstitutional violation of the owner's privacy."

Brennan, J., dissenting in Lopez v. United States, 373 U.S. 427, 464 (1963), was not so certain: "But in any event, it is premature to conclude that no warrant for an electronic search can possibly be devised. The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment,' Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 272 (separate opinion); see McDonald v. United States, 335 U.S. 451, 455; Abel v. United States, 362 U.S. 217, 251-52 (dissenting opinion), could be made a precondition of lawful electronic surveillance."

121 373 U.S. 427 (1963).

122 343 U.S. 747 (1952).

123 As Mr. Justice Harlan put it, "this case involves no 'eavesdropping' whatever in any proper sense of that term. The government did not use an electronic device to listen in on conversation it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." 373 U.S. at 439.

obtained by an undercover agent or informer simply because a criminal was unaware of the true nature of the person with whom he was dealing,[123A] and this is about the only basis on which the evidence in *On Lee* and *Lopez* could be excluded.

The Lopez Dissent: A Right to Privacy

The true significance of the *Lopez* case is to be found in the fact that it indicates the strong dissatisfaction with the *On Lee* holding on the part of four[124] of the then members of the Court, and further shows a willingness on the part of three[125] of the then members of the Court to create a general right of privacy on the basis of the interaction of the fourth and fifth amendments. Such a right of privacy, as indicated by the dissenters, would strike at far bigger game than the concealed radio and recorder cases; it would deal a death blow to all wiretapping and electronic eavesdropping. The view of the minority appears to be based upon an overwhelming fear that electronic eavesdropping will lead inevitably to a police state.[126] It is doubtful that most people would view the discussion of narcotics violations, as in *On Lee,* or the offering of a bribe to a government agent, as in *Lopez,* as privileged communications protected by a nebulous right to privacy. It is further doubtful that most people would believe that good government, in the sense of convicting criminals through the use of the most modern scientific means available, will lead us down the path to tyranny.

It appears certain that future attacks on the existing eavesdropping rules will follow the lead of the *Lopez* minority. Efforts will be made to formulate a right to privacy which would entail the exclusion of any evidence obtained through the use of electronic devices without the consent of the person against whom such evidence is offered. Such is not the rule today, but could well be established by legislation, or by decision of the Supreme Court based upon the interaction of the fourth, fifth and sixth amendments.[127]

123A The Court has recently affirmed this position in Hoffa v. United States, 87 S. Ct. 408 (1966), where it stated: "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 413.

124 Chief Justice Warren and Justices Brennan, Douglas, and Goldberg.

125 Justices Brennan, Douglas, and Goldberg.

126 "Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny." 373 U.S. at 466.

127 See Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964).

The Law in State Courts

On the state level, if evidence is obtained through the use of electronic eavesdropping devices accompanied by a physical intrusion into a constitutionally protected area, the evidence is inadmissible in a state criminal trial.[128] In addition, at least seven states presently have statutes prohibiting the use of electronic eavesdropping techniques in varying degrees,[129] and these statutes operate within those states as an extension of the constitutional doctrine. The most comprehensive of such statutes appears to be that of Illinois,[130] which prohibits any person, including law enforcement officers, from using any device capable of being used to hear or record oral conversation. The statute prohibits the hearing or recording of any oral conversation without the consent of all of the parties thereto,[131] or the use or divulgence of any such information, and specifically provides that any evidence obtained in violation of the statute is inadmissible in any civil or criminal trial.

Despite such statutes, the suspicion persists, supported by some evidence,[132] that electronic eavesdropping is still conducted by law enforcement officers as an aid to investigation of crime. Thus, we find ourselves in the unhappy situation of seeing our law enforcement agencies violate the law in a good faith attempt to enforce the law. No effective sanction for violation of eavesdropping statutes has yet been developed.[133] Prosecutions have been few as might be expected. The prosecutor is in no position to antagonize the police, and indeed is the beneficiary of such illegal police conduct. The exclusionary rule which has been created as a control device over improper conduct of law enforcement officers has yet to prove its value. The chief result to date appears to be the failure to convict persons who would otherwise be convicted. If there has been any real effect on police conduct of criminal investigations, it has not yet become apparent; and so long

[128] This result is required by the holding in Mapp v. Ohio, 367 U.S. 643 (1961).

[129] CAL. PEN. CODE § 653h-j; ILL. CRIM. CODE § 14-1 to 14-7; MD. ANN. CODE art. 27, § 125A(a) (Supp. 1964); MASS. GEN. LAWS ANN. ch. 272, § 99 (Supp. 1964); NEV. REV. STAT. § 200.650 (1963); N.Y. PEN. LAW § 738; ORE. REV. STAT. § 165.540 (1)(c) (Supp. 1965).

[130] ILL. CRIM. CODE § 14-1 to 14-7.

[131] The statute reads "any party," but the Supreme Court of Illinois has recently held that any party who has not consented to the recording or radio transmission of his conversation may bar its admission in evidence against him. People v. Kurth, 34 Ill. 2d 387, 216 N.E.2d 154 (1966).

[132] See BRETON, THE PRIVACY INVADERS (1964); DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS (1959).

[133] See Foote, *Tort Remedies for Police Violation of Individual Rights*, 39 MINN. L. REV. 493 (1955); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65, 72-74 (1957).

as "clearing" crimes remains the standard of police efficiency it is doubtful whether the failure to convict will have much effect upon police practices.

Non-Electronic Eavesdropping

Not nearly as dramatic in impact as the electronic methods of eavesdropping, but equally important, are the common non-electronic methods in use today. Perhaps the oldest technique of crime investigation is the surveillance whereby a suspect is placed under observation and followed secretly wherever he goes. The surveillance may be loose or tight, for a short period or for extended periods, but in all cases it represents a form of eavesdropping. To date, there has been no indication that such methods of investigation violate any constitutional rights of the person under surveillance, and any evidence so obtained is admissible in a criminal trial.

It is unfortunate that the most celebrated surveillance case in modern times failed to reach a decision on the merits.[134] Such a decision would have provided answers to the many questions now surrounding the permissible scope and intensity of a surveillance, since these problems have not as yet received judicial consideration.

The overhearing of a conversation by non-trespassing government agents without the use of electronic aids has been upheld by the courts and the evidence so obtained admitted into evidence.[135] However, it would appear that if the eavesdropping is made possible by a trespass, the fourth amendment will be violated and any evidence so obtained will be excluded.[136] The same rule applies to "visual eavesdropping."[137] The propriety of law enforcement officers' use of visual aids has never been seriously questioned, and normally this use does not constitute eavesdropping at all.[138] The use of infra red lights which allow one to see in the dark without detection is a cause for some question, as is the use of concealed closed circuit television; but so far there has been no consideration of these devices by the courts.

The two-way mirror, although only recently receiving substantial

---

[134] Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965), decided on the basis of absence of federal jurisdiction. An abbreviated statement of the facts may be found at 335 F.2d 370 n.1.

[135] Anspach v. United States, 305 F.2d 48 (10th Cir. 1962), *cert. denied*, 371 U.S. 826 (1962).

[136] See Silverman v. United States, 365 U.S. 505 (1961).

[137] See McDonald v. United States, 335 U.S. 451 (1948); Brock v. United States, 223 F.2d 681 (5th Cir. 1955).

[138] See On Lee v. United States, 343 U.S. 747, 754 (1952); United States v. Lee, 274 U.S. 559 (1927); Hodges v. United States, 243 F.2d 281 (5th Cir. 1957).

publicity, is not a new device. For many years, for instance, it has been customary to equip interrogation and polygraph interrogation rooms with these devices allowing a person on the outside of the room to view the interior without disclosure. One federal court[139] has indicated approval of the use of evidence obtained by viewing an act of sodomy in a public washroom through a two-way mirror, but the holding is restricted to a situation where the view through the mirror is no greater than that afforded any member of the public entering the washroom. The two-way mirror has been used primarily in crime prevention activities as a general surveillanace aid. This type of surveillance which extends to all members of the general public coming within the area of view is perhaps the most distasteful type of eavesdropping, and the courts have so reacted, even though varying results have been reached.[140]

Mail Intercept

The security of the United States mail is quite generally accepted by the public. There are two types of surveillance which may be used with reference to mail. Mail intercept, which involves the opening of mail, is prohibited by federal statute,[141] but from time to time some doubt has arisen as to whether this prohibition has been strictly complied with by law enforcement officers. Mail cover is a form of surveillance consisting of the recording of the information contained on the outside of first-class envelopes, such as the name and address of the sender and the addressee and the postmark. In many cases where the identity or location of a particular person is unknown this information obtained through placing a mail cover on known associates of the person may provide very important investigative leads. This practice, which leaves the contents of the letter intact and undisclosed, has been held not to violate any constitutional rights of the person whose mail is so examined.[142] With new developments allowing the contents of

---

[139] Poore v. Ohio, 243 F. Supp. 777 (N.D. Ohio 1965).

[140] See Smayda v. United States, 352 F.2d 251 (9th Cir. 1965); Britt v. Superior Court, 58 Cal. 2d 469, 24 Cal. Rptr. 849, 374 P.2d 817 (1962); Bielicki v. Superior Court, 57 Cal. 2d 602, 21 Cal. Rptr. 552, 371 P.2d 288 (1962); People v. Young, 214 Cal. App. 2d 131, 29 Cal. Rptr. 492 (1963); People v. Norton, 209 Cal. App. 2d 173, 25 Cal. Rptr. 676 (1962).

[141] 39 U.S.C. 4057; POSTAL LAWS AND REGULATIONS § 113. This prohibition is now limited to first class mail due to the recent repeal of 18 U.S.C. 1702(c).

[142] See Canaday v. United States, 354 F.2d 849 (8th Cir. 1966); United States v. Schwartz, 283 F.2d 107 (3d Cir. 1960), *cert. denied*, 364 U.S. 942 (1961); United States v. Costello, 255 F.2d 876 (2d Cir. 1958), *cert. denied*, 357 U.S. 937 (1958).

a letter to be read without disturbing the apparent integrity of the envelope, it can be expected that the courts will be called upon to refine the law as it presently exists.

Conclusion

The law governing eavesdropping has been developed on a hit and miss basis. It is apparent that a continuation of this approach is highly undesirable. What is needed is a comprehensive statute designed to apply to all methods of eavesdropping, both electronic and non-electronic, and applicable to methods in current use as well as those methods known to be under development. A clear and concise regulation of these practices, recognizing the right of the citizen to conduct his everyday affairs in privacy, but making it possible for law enforcement agencies to compete with the criminal element on equal terms is long overdue. It is true, and almost all authorities agree, that there has been a lack of solid factual data upon which to base adequate legislation. This information, however, may never become available due to the natural reticence of the people in possession of the actual facts, and thus it would seem to be a poor excuse for the failure of Congress to act in this area. It has been suggested by many people that the best answer might well be the adoption of a statute patterned after the New York procedure, permitting the issuance of a court order to law enforcement officers upon the establishment of probable cause.[143] Such a statute containing clearly defined elements of the right to privacy and safeguards against abuse would be a welcome solution to the present confusion and uncertainty.

[143] See Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 200-08 (1952).